IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CLAYTON BYRD in his official capacity as Executive Director of the TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; KIMBROUGH FINE WINE & SPIRITS; and TOTAL WINE SPIRITS BEER & MORE	)	
Plaintiffs,	)	
v.	)	**Case No. 3:16-cv-02738**
	)	**Judge Sharp**
TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,	)	**Magistrate Judge Frensley**
Defendant.	)	

PLAINTIFF CLAYTON BYRD'S RESPONSE TO TENNESSEE FINE WINE AND SPIRITS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Clayton Byrd, in his official capacity as Executive Director of the Tennessee Alcoholic Beverage Commission ("Commission"), through counsel, the Tennessee Attorney General, hereby submits this response in opposition to the Motion for Partial Summary Judgment filed by Tennessee Fine Wines and Spirits d/b/a Total Wine Spirits Beer & More ("Total Wine") on January 20, 2017. (Doc. 55, Page ID ##292-99.) This Court should deny the motion because Tennessee's residency requirement for liquor retailers, Tenn. Code Ann. § 57-3-204(b)(2)(A), does not violate the dormant Commerce Clause or the Privileges and Immunity Clause of the United States Constitution, and thus, Total Wine is not entitled to a judgment as a matter of law.

FACTUAL AND PROCEDURAL BACKGROUND

Movant Total Wine is a Delaware corporation with headquarters located at 6600 Rockledge Drive, No. 150, Bethesda, Maryland 20817. (Doc. 1-1, Page ID# 5.) The company plans to open a retail package store in Tennessee and currently has an application pending with the Commission for a retail liquor license to open a store at 6622 Charlotte Pike, Ste. 104, Nashville, Tennessee 37209. (Doc. 1-1, Page ID# 5.) Due to its status as a nonresident corporation, Total Wine fails to meet the residency requirements in Tenn. Code Ann. § 57-3-204(b) for obtaining a retail liquor license in Tennessee. (Doc. 1-1, Page ID#7, ¶ 13.) This provision requires the applicant to be a resident of Tennessee during the two years immediately preceding the date of the application in order to qualify for a license and for at least ten consecutive years to renew the license. Tenn. Code Ann. § 57-3-204(b)(2)(A).

Total Wine submitted its application for a retail liquor license to the Commission on July 5, 2016, for a store located at 6622 Charlotte Pike, Suite 104, Nashville, Tennessee 37209. (Doc. 1-1, Page ID#5, ¶ 4; Aff. Byrd ¶ 4.) Representatives of the company did not meet with Director Byrd before submitting their application but subsequently met with him on July 11, 2016, to discuss Total Wine's application. (Aff. Byrd ¶¶ 5-6.) Director Byrd was not aware of Total Wine's application before that meeting and there was no discussion of the residency requirements. (Aff. Byrd ¶ 6-7.)

On July 16, 2016, the Commission was contacted by Defendant Tennessee Wine & Spirits Retailers Association ("TWSRA"), which represents a large number of in-state independent package store owners. (Doc. 1-1, Page ID#8, ¶ 16.) The TWSRA informed Director Byrd that it would file a lawsuit against the Commission if it granted a retail liquor license to a nonresident entity, which would include Total Wine. (Doc. 1-1, Page ID#8, ¶ 17.)

In a subsequent conversation on August 18, 2016, Director Byrd discussed the residency requirement with Total Wine and the Commission's dilemma with enforcement in light of the Attorney General's opinion that the statute was unconstitutional, at which time Total Wine threatened litigation should its application be denied. (Doc. 1-1, Page ID#8, ¶ 18; Aff. Byrd ¶¶ 8-9.) Director Byrd took no position with respect to the constitutionality of the residency requirement during that conversation. (Aff. Byrd ¶ 9.)

The Commission scheduled Total Wine's application to be heard at its August 23, 2016, meeting; however, consideration of the application was continued until September 29, 2016, for the Commission to consult with counsel, the Tennessee Attorney General, regarding the legal ramifications of granting or denying the application. (Doc. 1-1, Page ID #7.) Total Wine's application is currently pending.

On September 21, 2016, the Commission filed a Complaint for Declaratory Judgment in Davidson County Chancery Court against Total Wine and Affluere Investments d/b/a/ Kimbrough Fine Wine & Spirits ("Kimbrough"), the other nonresident applicant involved in this litigation, and the TWSRA (Doc. 1-1, Page ID##1-14.) The case was subsequently removed to this Court and the parties realigned, resulting in Total Wine, Kimbrough, and the Commission positioned as Plaintiffs and the TWSRA as the sole Defendant. (Doc. 1, Page ID ##1-3; Doc. 53, Page ID ##289-90.)

On January 20, 2017, Total Wine filed a Motion for Partial Summary Judgment alleging that Tennessee's residency requirement violates the dormant Commerce Clause, Article I, § 8, and the Privileges and Immunities Clause, Article VI, § 2, of the United States Constitution and does not "advance any legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." (Doc. 55, Page ID ##293-94.)

ARGUMENT

Tennessee regulates alcohol distribution and sales using what is commonly referred to as a three-tier system of manufacturers, wholesalers, and liquor retailers. *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008.) All three classes of participants must have a state license to sell alcohol to others in the chain or, in the case of retailers, to the general public. *See* Tenn. Code Ann. § 57-3-201(1)-(3), 404(a); *Jelovsek*, 545 F.3d at 434. Manufacturers must sell to wholesalers who may sell to retailers and other wholesalers. Tenn. Code Ann. 57-3-404(b)-(d); *Jelovsek*, 545 F.3d at 434. Under the statutory scheme, retail liquor licenses are restricted to those who meet the enumerated requirements in Tenn. Code Ann. § 57-3-204(b), including a residency requirement that provides:

> (2) No retail license under this section may be issued to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission or, with respect to renewal of any license issued pursuant to this section, who has not at any time been a resident of this state for at least ten (10) consecutive years. . . .

Tenn. Code Ann. § 57-3-204(b)(2)(A). Additionally, there are residency requirements for corporations and their officers, directors, and stockholders who apply for a retail license as follows:

> (3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to any corporation unless such corporation meets the following requirements:
>
> > (A) No retail license shall be issued to any corporation if any officer, director or stockholder owning any capital stock in the corporation, would be ineligible to receive a retailer's license for any reason specified in subdivision (b)(2), if application for such retail license had been made by the officer, director or stockholder in their individual capacity;
> >
> > (B) All of its capital stock must be owned by individuals who are residents of this state and either have been residents of the state for the two (2) years immediately preceding the date application is made to the

> commission or, with respect to renewal of any license issued pursuant to this section, who has at any time been a resident of this state for at least ten (10) consecutive years;
>
> (C) No person owning stock in such corporation shall have any interest as partner or otherwise, either direct or indirect, in any business licensed to engage in the distribution of liquor, spirits, wine or high alcohol content beer in Tennessee; and
>
> (D) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of this state and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of this state for at least ten (10) consecutive years.

Tenn. Code Ann. § 57-3-204(b)(3)(A)-(D). The General Assembly's stated purpose for the residency requirement is also found in Tenn. Code Ann. § 57-3-204(b):

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(4).

The issue raised by Total Wine in its Motion for Partial Summary Judgment is actually the determinative issue in the Commission's lawsuit, namely, whether Tennessee's residency requirement barring nonresident entities from obtaining a retail liquor license is unconstitutional and thus unenforceable against Total Wine and Kimbrough. The resolution of this issue lies at the intersection of the State's right to regulate the sale of alcohol within its borders under the Twenty-first Amendment and the restrictions on such regulation found in the Commerce and Privilege and

Immunities Clauses. *Southern Wine and Spirits of America, Inc. v. Division of Alcohol and Tobacco Control*, 731 F.3d 799, 803 (8th Cir. 2013).

I. TENNESSEE'S RESIDENCY REQUIREMENT FOR ALCOHOL RETAILERS IS AUTHORIZED BY THE TWENTY-FIRST AMENDMENT AND DOES NOT IMPLICATE THE DORMANT COMMERCE CLAUSE, AND IS THUS CONSTITUTIONAL.

A. The United States Supreme Court has held the three-tier regulatory scheme is unquestionably constitutional under the Twenty-first Amendment, and as long as a residency requirement does not discriminate against out-of-state producers or products, such requirements are not subject to a Commerce Clause challenge.

A state's use of three-tier distribution scheme to regulate the sale and importation of alcohol, such as Tennessee's, has been upheld by the United States Supreme Court as authorized by § 2 of the Twenty-first Amendment of the United States Constitution. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) ("We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'") (citation omitted). The Twenty-first Amendment prohibits the "transportation or importation" into any state in violation of that state's laws. U.S. Const. amend. XXI, § 2. It was designed to protect the States' core interest in promoting temperance, insuring an orderly alcohol market, and generating revenues through the regulation of manufacturing, distribution, and sale of alcohol within its borders. *Brooks v. Vassar*, 462 F.3d 341, 351 (4th Cir. 2006).

On the other hand, states may not pass laws that treat the economic interests of its residents more beneficially than those of nonresidents without running afoul of the dormant Commerce Clause. *Granholm*, 544 U.S. at 472; *Southern Wine and Spirits*, 731 F.3d at 804. The purpose of the Commerce Clause as intended by the Framers was to avoid "economic Balkanization" and limit a state's ability to create rivalries with other states by burdening nonresident producers or shippers to give a competitive edge to its own. *Granholm*, 544 U.S. at 472-73. When the Twenty-first Amendment is harmonized with the Commerce Clause, the result is that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id*. at 487. Under that principle, a state statute that directly discriminates against interstate commerce or that favors resident economic interests over nonresidents in effect is unconstitutional. *Id*.

The Commerce Clause does not, however, limit a State's complete control over how to structure the alcohol distribution chain within its borders via a three-tier system, which is derived from its authority under the Twenty-first Amendment. *Granholm*, 544 U.S. at 488-89; *Southern Wine and Spirits*, 731 F.3d at 805-806. As the United States Supreme Court recently explained in *Granholm*, state statutes "are protected under the Twenty-first Amendment when they treat liquor *produced* out of state the same as its domestic equivalent." 544 U.S. at 489 (emphasis added); *see also Southern Wine and Spirits*, 731 F.3d at 809; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2d Cir. 2009). This means that as long as a state statute does not discriminate against nonresident liquor producers or products with its three-tier system, the statute is protected from Commerce Clause challenges. *See Granholm*, 544 U.S. at 489; *Southern Wine and Spirits*, 731 F.3d at 809; *Arnold's Wines*, 571 F.3d at 190 ("*Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause."). The Sixth Circuit stated this principle in *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008), that "Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds."

Analysis of state alcohol regulations under the Commerce Clause and the Twenty-first Amendment is two-fold. The court first determines whether the challenged provision discriminates against interstate commerce in a manner that violates the Commerce Clause, and if so, it must serve a legitimate state interest that cannot otherwise be accomplished by nondiscriminatory means under Commerce Clause jurisprudence to survive. *See Granholm*, 544 U.S. at 489; *Brooks*, 432 F.3d at 351-52. If it does not implicate the Commerce Clause, it is protected under the state's authority derived from the Twenty-first Amendment. *See Granholm,* 544 U.S. at 489; *Southern Wine and Spirits*, 731 F.3d at 809; *Arnold's Wines,* 571 F.3d at 190; Brooks, 462 F.3d at 352-54. For example, the New York and Michigan laws struck down in *Granholm* fell outside what was authorized by the Twenty-first Amendment by creating favorable exceptions in the three-tier system allowing in-state producers to ship directly to consumers while prohibiting out-of-state producers from doing so. 544 U.S. at 465-66. This is the type of economic protectionism the Commerce Clause prohibits. *See* 544 U.S. at 474; *Arnold Wines*, 571 F.3d at 191. Without Twenty-first Amendment protection, the provisions merely discriminated against interstate commerce and did not pass muster under the Commerce Clause requirement that they advance a legitimate local purpose that could not be achieved by reasonable nondiscriminatory alternatives. *See Granholm,* 544 U.S. at 489; *Southern Wine and Spirits,* 731 F.3d at 809; *Arnold's Wines*, 571 F.3d at 190.

The question in the present case is whether the residency requirement applicable to the retailers' tier of Tennessee's regulatory scheme is protected by the Twenty-first Amendment. The Eighth Circuit recently considered this issue when a Missouri company challenged the residency requirements after being denied a wholesaler's liquor license under Missouri's tier system. *Southern Wine and Spirits,* 731 F.3d at 802. The applicant company was incorporated in Missouri but its parent company was a Florida corporation; thus, it did not fit the definition of a "resident corporation" under the licensing statutes. *Id*. at 803. In upholding the residency requirement against a dormant Commerce Clause challenge, the court found that the residency requirement defined the type of in-state presence required to qualify as a wholesaler in Missouri's three-tier system, which was authorized by the Twenty-first Amendment. *Id*. at 805-806, 809-810. As such, the restriction did not discriminate against out-of-state liquor products or producers that would implicate the Commerce Clause. *Id*. The court found it unnecessary to balance the state's interests under the Commerce Clause when the residency requirement treated in-state and out-of-state liquor equally and did not discriminate against out-of-state products or producers. *Id*. Instead, the court applied deferential scrutiny to the definitions in the three-tier system and found the residency requirement was sufficiently related to the state's legitimate purpose in promoting temperance to be valid. It was reasonable for the legislature to believe that resident wholesalers living in the communities where they distribute liquor were more apt to be socially responsible and responsive to the concerns of Missouri citizens, and law enforcement would be aided in that in-state officers and directors would be easier to pursue than if they were out-of-state. *Id*. at 811.

The Second Circuit has likewise upheld a New York ban on direct sales to consumers by nonresident liquor retailers against a Commerce Clause challenge by out-of-state retailers and consumers. *Arnold's Wines*, 571 F.3d at 191. New York's statute allowed in-state retailers, but not out-of-state, to obtain a license to deliver liquor off premises. *Id*. at 188. Applying the principles in *Granholm*, the court found that the challenged provision did not distinguish between liquor produced in New York and out-of-state liquor since licensed in-state retailers could ship both to New York consumers. *Id*. at 190. The court rejected the out-of-state retailers' argument that in-state retailers had a benefit not afforded to out-of-state retailers as a frontal attack on the constitutionality of the three-tier system. *Id*. at 190; *see also Southern Wine*, 731 F.3d at 810; *Brooks*, 462 F.3d at 352 ("But an argument that compares the status of an in-state retailer with an out-of-state retailer—or compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself."). The state was within its power to regulate importation and use of alcohol under the Twenty-first Amendment to require that all wholesalers and retailers be present in and licensed by the state, and such a challenge to the tier system was "foreclosed by *Granholm* Court's express affirmation of the legality of the three-tier system." *Id*. at 190-91. Because the New York law treated in-state and out-of-state liquor evenhandedly and required both to pass through the three-tier system, it complied with *Granholm*'s nondiscrimination principle. *Id*. at 191.

B. Tennessee's residency requirements for retailers in the three-tier system does not discriminate against out-of-state liquor producers or products and thus, is not subject to a Commerce Clause challenge.

Total Wine contends that the residency requirements discriminate against interstate commerce. But Tennessee's residency requirement for retailers does not affect out-of-state producers or the flow of out-of-state liquor products. Rather, it is part and parcel of the retail tier of the State's three-tier regulatory scheme governing who is allowed to sell liquor within its borders, which has been declared to be constitutional in *Granholm*. Thus, the requirements fall into the category of regulations that the *Granholm* Court found to be protected by the Twenty-first Amendment.

Additionally, Tennessee's residency requirement is unlike the provisions struck down in *Granholm* that discriminated against out-of-state producers by barring them from shipping their products to consumers while allowing in-state producers to do so. *See Granholm*, 544 U.S. at 467-69. The residency requirement is even-handedly applied to every retailer who applies for a license, whether in-state or out, and in fact, applicants who are already Tennessee residents may not meet the two-year requirement along with their out-of-state counterparts. The residency requirement does nothing to inhibit the free flow of out-of-state liquor to those who meet the requirements of licensed wholesalers and retailers, who are free to sell both in-state and out-of-state liquor products directly to the general public. This requirement is much more akin to those upheld against a Commerce Clause challenge by the Eighth and Second Circuits discussed above. Because Tennessee's provisions do not discriminate against out-of-state producers or products, the Commerce Clause is not implicated and no balancing under Commerce Clause jurisprudence is necessary. Rather, the residency requirements arise from Tennessee's authority under and are protected by the Twenty-first Amendment.

C. Tennessee's residency requirement is not the type of restriction invalidated by the Sixth Circuit in *Jelovsek v. Bredesen*.

Total Wine argues that the residency requirements here are nearly identical to the Grape and Wine Law struck down by the Sixth Circuit in *Jelovsek v. Bredesen*, 545 D.3d 431 (6th Cir. 2008), but this comparison is misplaced. There were two aspects affecting residency in the Grape and Wine Law provisions being challenged. One part prohibited direct shipping of wine to customers, which the court found constitutional and distinguished it under *Granholm* because the ban affected both in-state and out-of-state producers. *Id*. at 433. The second part had a residency requirement for wine producers and discriminated against out-of-state wine producers in ways that gave Tennessee wineries a competitive advantage. *Id*. at 438-39. It was this provision the court found discriminatory on its face under the Commerce Clause.

Tennessee's residency requirement does not discriminate against sales or transport of out-of-state goods or impermissibly give in-state goods or producers a competitive advantage. The offending statute in *Jelovsek* made exceptions to Tennessee's three-tier system, much like the Michigan and New York statutes invalidated in *Granholm*, to allow transport of in-state wine products in ways that out-of-state producers were barred from doing. 545 F.3d at 433. In fact, the court noted that *Jelovsek* was one of several lawsuits challenging such provisions after *Granholm*. *Id*. Unlike the exceptions in *Jelovsek*, the Tennessee residency requirements do not go outside the protection of the three-tier system and are firmly rooted in the regulation of who may be a retailer to sell products within Tennessee, regardless of whether the source of the liquor is in-state or out-of-state. Thus, the residency requirements for retailers do not affect interstate commerce and are not subject to a Commerce Clause Challenge. *See id*. at 436 ("Tennessee's decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds.").

II. THE PRIVILEGES AND IMMUNITIES CLAUSE HAS NO APPLICATION TO THE MOVANT-CORPORATION.

Movant next argues it is entitled to summary judgment because Tennessee's residency requirement violates the Privileges and Immunities Clause of the United States Constitution. This argument is without merit because the clause has no application to movant-corporation.

The Privileges and Immunities Clause provides that "[t]he *Citizens* of each State [are] entitled to all Privileges and Immunities of *Citizens* in the several States." U.S. Const. Art. IV, § 2, cl. 1 (emphasis added). The purpose of the clause is to place the citizens of each State "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *McBurney v. Yound*, 133 S. Ct. 1709, 1714 (2013). The clause does not prohibit all distinctions based on state citizenship or residency, but does protect those privileges and immunities that are "fundamental." *Id.*

Movant contends that the United States Supreme Court has repeatedly found that one of the privileges the clause guarantees to "citizens of State A is doing business in State B on terms of substantial equality. . ." (Doc. Entry No. 57, p. 10.) While this may be true, this argument overlooks the fact that the United States Supreme Court has long recognized that the Privileges and Immunities Clause does not apply to corporations, such as movant. *Western and Southern*

Life Ins. Co. v. State Bd. Of Equalization of California, 101 S. Ct. 2070, 2076-77 (1981): *Hemphill v. Orloff*, 48 S. Ct. 577, 589 (1928); see also *Wal-Mart Stores, Inc. et al. v. Texas Alcoholic Beverage Commission, et al.*, 110 F. Supp. 719, 729-30 (W.D. Tex. 2015)(Corporation's claim challenging Texas Alcoholic Beverage Commission regulation preventing it from obtaining a license to sell hard alcohol because of its status as publicly traded company on grounds it violated Privileges and Immunities Clause dismissed since clause does not apply to corporations.); *Metropolitan Washington Chapter, Associated Builders and Contractors, Inc., et al. v. District of Columbia, and Vincent C. Gray, in his official capacity as Mayor of the District of Columbia*, 57 F.Supp.3d 1, 20 n. 9 (D.D.C. 2014)(Privileges and Immunities Clause does not apply to corporations.)

As a corporation, movant has no standing to assert a violation of the Privileges and Immunities Clause as it is not a "citizen" within the meaning of the clause and cannot rely upon the rights guaranteed to individuals. *Washington Chapter, Associated Builders and Contractors, Inc., et al.*, 57 F.Supp.3d at 20 n. 9; *Hemphill*, 48 S. Ct. at 589.[1] Therefore, movant's argument fails.

CONCLUSION

For the foregoing reasons, this Court should deny Total Wine's Motion for Partial Summary Judgment.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General & Reporter

[1] Constitutional minimum requirement to establish standing requires three elements, one of which is an injury in fact-an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 111 S. Ct. 2130, 2136 (1992).

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